

JS-6

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

JESSE CANTU, individually and on behalf
of all others similarly situated,

Plaintiff,

v.

VIMEO.COM, INC., a Delaware
corporation; and DOES 1 through 25,
inclusive,

Defendants.

Case No. 2:22-cv-08888-SVW-E

**ORDER ON PLAINTIFF'S NOTICE
OF VOLUNTARY DISMISSAL
PURSUANT TO FEDERAL RULE OF
CIVIL PROCEDURE 41(a)(1)(A)(i)**

Filed: December 8, 2022

IT IS SO ORDERED.

DATED: February 10, 2023



**STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE**

1 TO THE COURT, CLERK AND ALL PARTIES OF RECORD, please take notice
2 that Plaintiff Jesse Cantu (“Plaintiff”) respectfully requests dismissal of the instant action
3 pursuant to Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure *with prejudice* as
4 to the Plaintiff’s individual claims, and *without prejudice* as to the putative class. There
5 has been no responsive pleading or motion filed, no class has been certified, and there is
6 no settlement or concession of class interests in order to resolve Plaintiff’s individual
7 claims.

8 Pursuant to Rule 23(e), “the district court should inquire into possible prejudice
9 from (1) class members’ possible reliance on the filing of the action if they are likely to
10 know of it either because of publicity or other circumstances, (2) lack of adequate time
11 for class members to file other actions, because of a rapidly approaching statute of
12 limitations, (3) any settlement or concession of class interests made by the class
13 representative or counsel in order to further their own interests.” *Diaz v. Trust Territory*
14 *of the Pacific Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989).

15 Plaintiff contends the *Diaz* factors do not apply to the facts of this case, but even
16 if they did, dismissal is nonetheless proper. In 1989, the Ninth Circuit held in *Diaz* that
17 Rule 23(e) applies prior to class certification. 876 F.2d at 1408. At that time, Rule 23
18 provided that “[a] class action shall not be dismissed or compromised without the
19 approval of the court” Fed. R. Civ. P. 23(e) (as amended Mar. 2, 1987, eff. Aug. 1,
20 1987). Under *Diaz*, the district court evaluating dismissal is to “inquire into possible
21 prejudice from (1) class members’ possible reliance on the filing of the action if they are
22 likely to know of it either because of publicity or other circumstances, (2) lack of
23 adequate time for class members to file other actions, because of a rapidly approaching
24 statute of limitations, (3) any settlement or concession of class interests made by the class
25 representative or counsel in order to further their own interests.” 876 F.2d at 1408
26 (citations omitted).

27 Notably, *Diaz* was decided prior to amendments to Rule 23(e), which clarified that
28 Rule 23(e) applies to certified classes or settlement classes. Specifically, Rule 23(e) now

1 provides that “[t]he claims, issues, or defenses of a *certified class*—or a *class proposed*
2 *to be certified for purposes of settlement*” may be settled or voluntarily dismissed “only
3 with the court’s approval.” Fed. R. Civ. P. 23(e) (emphasis added); *see also Lee v. CVS*
4 *Pharmacy, Inc.*, No. 3:20-cv-01923-BEN-DEB, 2021 WL 308283, at *2 (S.D. Cal. Jan.
5 28, 2021) (acknowledging that “in 2003, the Congress revised Rule 23 to make clear that
6 court approval is only required in a putative class action where the plaintiff seeks to
7 approve a settlement of both individual and class claims”); 7B Charles Alan Wright &
8 Arthur R. Miller, Fed. Prac. & Proc., *Settlement, Voluntary Dismissal, or Compromise of*
9 *Class Actions* § 1797 (3d ed. 2021) (“settlements or voluntary dismissals that occur
10 before class certification are outside the scope of subdivision (e)”). Accordingly, because
11 no class has been certified and there is no settlement of any kind in this action, Rule 23(e)
12 does not apply. *See* Fed. R. Civ. P. 23(e).

13 Nevertheless, even if the Court were to apply the *Diaz* factors to these
14 circumstances, dismissal would be proper. *First*, it is unlikely that any putative class
15 members have relied on the action to protect their interests given that the case is in its
16 infancy and there are no circumstances suggesting reliance on Plaintiff’s claims. This
17 action has not been publicized in any way and as such, the putative class members are
18 highly unlikely to have knowledge of it, or to have relied upon it in any way. Similarly,
19 Plaintiff’s counsel is unaware of any other circumstances that may have led to the
20 putative class’s knowledge of, or reliance upon, this action. *Second*, just two months
21 have passed since the filing of the Complaint. Plaintiff’s earliest interaction with the chat
22 feature on Defendant’s website was in December 2022 and as such, based on the one-
23 year statute of limitations associated with his cause of action, the statute of limitations
24 shall not run until December 2023. As such, the rights of the putative class are preserved
25 by the solely individual dismissal of Plaintiff’s claims with prejudice. *Third*, as discussed
26 above, there is no settlement or concession of putative class interests given that there has
27 been no settlement or compromise of any kind related to any potential class claims
28 asserted in the Complaint. Indeed, the resolution reached between the Parties does not

1 address, affect, or change the putative class's rights or claims in any manner. Even under
2 *Diaz*, dismissal is clearly proper here.

3 The parties have diligently followed the rules to obtain a voluntary dismissal prior
4 to any substantive response to the Complaint. *Diaz* should not stand as a barrier to
5 dismissal, given the subsequent amendments to Rule 23(e) and the facts of this case in
6 which there is no settlement or compromise of any class claims, no collusion, and no
7 potential prejudice to any putative class member. Moreover, the dismissal as to any
8 putative class members would be *without prejudice*.

9 For all the foregoing reasons, the Plaintiff respectfully requests that the Court enter
10 a dismissal of this action with prejudice as to the named Plaintiff and *without prejudice*
11 as to the putative class.

12 Respectfully submitted,

13 Dated: February 9, 2023

PACIFIC TRIAL ATTORNEYS

14 By: /s/ Scott J. Ferrell

15 Scott J. Ferrell
16 Attorney for Plaintiff
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